

Minutes
(unofficial until approved)
Joint Committee on Attorney Standards
Ramada Hotel, Bismarck
September 12, 2014

Members Present

Judge Michael Sturdevant, Chair
George Ackre
Jeremy Bendewald
Duane Dunn
Judge Paul Jacobson
Kara Johnson
Michael McGinniss
Alex Reichert
Justice Dale Sandstrom
Jason Steffenhagen
Nick Thornton

Members Absent

Judge Dann Greenwood
Dan Ulmer
Jason Vendsel

Staff

Jim Ganje
Tony Weiler

Others Present

Al Austad, ND Association for Justice

Chair Sturdevant called the meeting to order at 10:00 a.m. and drew Committee members' attention to minutes of the June 10, 2014, meeting. It was noted that Judge Jacobson should be reflected as having been present at the meeting.

It was moved by Kara Johnson, seconded by Jeremy Bendewald, and carried that the minutes, as corrected, be approved.

ABA Commission on Ethics 20/20 - Cont'd Review of Amendments to Model Rules of Professional Conduct

Staff reviewed draft amendments to North Dakota Rules 7.2 and 7.3 resulting from the Committee's June meeting discussion.

Rule 7.2 - Advertising. Staff explained that the draft amendments include three options with respect to paragraph (b) of the rule, which relates to retention by the lawyer of a copy or recording of an advertisement or communication regarding lawyer services. The first option would retain current paragraph (b), the second option would delete the paragraph, and the third option would add language to specify that it is a copy of "a printed advertisement or communication" that must be

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retained for the prescribed period of time. Staff said the draft amendments also incorporate model rule amendments in Comments [1] and [5].

In response to a question from Duane Dunn, Kara Johnson said there have been very few instances in which copies of advertisements or communications have been requested in disciplinary cases. Judge Jacobson noted that the issue did not arise in the nineteen years during which he served as disciplinary counsel.

Duane Dunn noted that there are many different kinds of media by which communications can be transmitted and wondered whether there is any utility in retaining the copy retention requirement if the issue rarely arises.

Kara Johnson said she would prefer that the requirement not be eliminated, but the paragraph could perhaps be refashioned to provide clearer guidance.

Nick Thornton wondered whether the copy requirement might, in the current realm of social media, apply to those communications that might not clearly be considered advertisements, such as question and answer forums or Facebook posts. He said these kinds of exchanges of information likely were not contemplated when Rule 7.2 was first drafted and the rule's requirement may now become a trap for the unwary lawyer.

Mike McGinniss observed that Rule 7.1 governs communications about legal services and is very broad in scope. He said one question concerning Rule 7.2 is whether its copy retention requirement encompasses "communications" about legal services. He said there is likely a legitimate concern about drawing communications subject to Rule 7.1 into the copy requirement under Rule 7.2. Kara Johnson agreed that Rule 7.2's reference to "communication" is a source of concern.

Alex Reichert said the third option draft amendment would address some of his concerns expressed at the June meeting. However, he said the discussion has caused more concern with respect to the uncertainty about what might be the scope of the paragraph (b) requirement. He noted mention of Facebook postings, which may consist of only a piece of an advertisement set out in a banner ad that the lawyer has not approved and does not receive a copy of. He said there are other internet locations, such as Google, that may show a lawyer's name or a brief ad, but the lawyer may never have actually seen the ad beforehand. He wondered whether the mention of "advertisement" in the rule could be qualified with language that the advertisement "makes a claim about services" or provides more than very basic information.

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Mike McGinniss noted that ABA Model Rule 7.2 does not include the copy requirement. Staff explained that current North Dakota Rule 7.2 resulted from an earlier review of the Rule 7 series regarding lawyer advertising and rule amendments were patterned in part after amendments in an ABA whitepaper on lawyer advertising.

Judge Sturdevant said one purpose of the rule is to protect the lawyer by having a copy of an advertisement in the event disciplinary issues later arose. However, he said, a lawyer may have little or no control over what others do in terms providing information about the lawyer.

Alex Reichert asked whether, in light of the very few instances in which the issue arises, there would be any harm in simply deleting paragraph (b) from the rule. Kara Johnson responded that while the requirement may rarely come into play, it would likely be easier for disciplinary counsel to respond to a complaint if a copy of the advertisement were available.

Nick Thornton suggested that if the primary goal is to protect the lawyer, then perhaps paragraph (b) could be deleted and language could be included in the Comment that a preferred practice is for the lawyer to retain a copy of the advertisement.

Following further discussion, **it was moved by Alex Reichert, seconded by Nick Thornton, and carried that paragraph (b) and related Comment [4] be deleted.**

It was moved by Mike McGinnis, seconded by Nick Thornton, and carried that draft amendments incorporating model rule amendments in Comments [1] and [5] be approved.

Rule 7.3 - Direct Contact with Prospective Clients. Staff reviewed the draft amendments resulting from the June meeting discussion: incorporating the model rule's references to "target of solicitation" as the focus of solicitation rather than "prospective client"; inserting related model Comment [1]; and deleting the dissent currently appended to the rule. He said the draft amendments also modify paragraph (a) to more directly tie the prohibition against in-person contact to "anyone known to be in need of legal services", rather than to the paragraph's current reference to "prospective client". He said parallel revisions are made to "prospective client" references in the Comments.

Judge Jacobson drew attention to the first sentence in Comment [1] to Rule 1.18 which distinguishes the use of "potential client" in that rule from the use of "prospective client" in Rule 7.3. He said the sentence would no longer be necessary with the amendments to Rule 7.3.

It was moved by Judge Jacobson, seconded by Kara Johnson, and carried that Comment [1] to Rule 1.18 be modified to delete the first sentence.

Mike McGinniss noted that the references in the Comments to a person in need of legal services vary from the language to be included in paragraph (a). He said the draft comment amendments refer to “a person who may be in need of legal services”, while the paragraph (a) amendments are directed at a person “known to be” in need of legal services. He said the “may” construction in the draft comment amendments may introduce some uncertainty. He suggested, and Committee members agreed, that the draft references in current Comments [2], [3], and [5] be revised to reflect the paragraph (a) draft amendments.

Following further discussion, **it was moved by Kara Johnson, seconded by Nick Thornton, and carried that the draft amendments to Rule 7.3, as modified, be approved.**

Review of Previous Rule Amendments

Staff next reviewed rule amendments tentatively approved as part of the Ethics 20/20 project. A general description of the amendments is included in the Summary (meeting material, pp. 3-4). Rules and amendments reviewed: Rule 1.0, 1.1, 1.6, 1.17, 1.18, 4.5, 5.3, 5.5, and 8.5. The amendment to Rule 1.18, related to the amendments to Rule 7.3, was noted.

With respect to Rule 5.5 (meeting material, pp. 49-54), Mike McGinniss noted the earlier agreed-to replacement of “other permanent presence” with “presence other than temporary for performing legal services” in Comment [2]. The modification, he said, is related to the amendment to paragraph (c) of the rule. He said a similar language change is likely necessary in Comment [9], which also refers to “other permanent presence in the state”. He suggested the phrase should be replaced with “whose presence for performing legal services in the state is other than temporary”. Committee members agreed with the suggested change.

With respect to the rule amendments generally, staff explained that, as requested at the June meeting, source notes have been added at the end of each rule indicating dates of adoption and amendment, as applicable. He said notice information back to 1997 was reviewed to obtain the dates.

Chair Sturdevant said it appeared that the Committee’s review of the Ethics 20/20 amendments to the ABA Model Rules and consideration of related North Dakota rules was now complete.

It was moved by Mike McGinniss, seconded by Judge Jacobson, and carried that the assembled rule amendments be approved for submission to the Board of Governors for review and, in the absence of any Board comment requiring Committee action, be approved for submission to the Supreme Court for its consideration.

Rule Proposals Related to Collaborative Law - Request for Comment from the Joint Procedure Committee

Chair Sturdevant drew Committee members' attention to the request for comment submitted to the Committee by Justice Sandstrom, Chair of the Joint Procedure Committee. The request solicits any Committee comments regarding rule proposals to be considered by the Joint Procedure Committee which would establish a rule framework related to the practice of collaborative law (see meeting material, pp. 59-87). The primary point of interest is with respect to any ethical issues that may be posed by collaborative law practice and whether any Rules of Professional Conduct would be affected. It was noted that the SBAND Ethics Committee and the ABA Standing Committee on Ethics and Professional Responsibility had issued opinions concluding that the practice of collaborative law is consistent with applicable ethical rules (see meeting material, pp. 88-95).

Justice Sandstrom reviewed the letter requesting comment and the alternative rule proposals included with the letter. He said it is uncertain how much collaborative law would be used in the state, but it would be an additional alternative method of resolving disputes.

Judge Sturdevant observed that current rules governing the scope of representation likely address situations in which collaborative law may be involved.

Tony Weiler noted there has been some concern expressed about the possible extra cost to the client if collaborative law is used and another lawyer becomes necessary.

George Ackre cautioned that collaborative law may add one more option to litigation that could become unduly confusing to the client in deciding which of the options to pursue. North Dakota, he said, is a small state with a relatively low rate of litigation and adding collaborative law may make a case more complex.

Chair Sturdevant noted that the primary consideration for the Committee is whether the practice of collaborative law poses any issues that would involve the Rules of Professional Conduct. He observed that the collaborative law concept originated in Minnesota in the 1990's and there apparently have been no noticeable problems.

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After further discussion, it was moved by Mike McGinniss, seconded by Jason Steffenhagen, and carried that the Committee concludes there are no issues related to the Rules of Professional conduct that would inhibit the practice of collaborative law in the state.

Client Protection Fund - Possible Changes in Operation

Tony Weiler provided an update regarding the review of current rules governing the Client Protection Fund. He said there is a general conclusion that the current rules are limited in scope and not entirely responsive to situations the fund was intended to address. He said a number of suggestions have been received and a new draft rule based on the ABA model rule has been prepared. He said the draft proposal would be submitted to the Board of Governors for consideration. He said he is uncertain whether the proposed rule would entirely address the issues the Committee has discussed in its consideration of possible amendments to Rule 1.5 regarding fee agreements.

In response to a question from Justice Sandstrom, Tony Weiler said some of the more notable changes in the draft rule relate to the kinds of claims that would be subject to compensation from the fund, the status of the lawyer against which a claim could be brought, and a broader scope with respect to the misconduct that could lead to a claim. He said embezzlement is the current focus of the rule. He said the proposal would also address some of the situations the Committee has discussed with respect to nonrefundable retainers and would include a catch-all provision that would allow the Client Protection Fund Committee to review any and all claims that are determined worthy of review.

Lawyer Discipline System Review - Supreme Court Referral

Chair Sturdevant then drew Committee members' attention to the Supreme Court's referral to the Committee of the ABA Report on the Lawyer Discipline System, which was provided as a separate enclosure with the meeting material.

Staff provided a brief overview of the recommendations contained in the report.

Chair Sturdevant noted that the Supreme Court's referral suggested the addition of temporary members to the Committee to assist in review of the Report. Specifically, he said, the referral suggests adding representatives from the Disciplinary Board, Operations Committee, Inquiry Committees, and SBAND Board of Governors, as well as Disciplinary Counsel, an attorney who represents lawyers in disciplinary proceedings, and a public member or legislator.

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Committee members discussed possible temporary members who could be contacted to determine availability and willingness to participate in the review. Chair Sturdevant will make the contacts

There being no further discussion, the meeting was adjourned at 12:50 p.m.